

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOBIAS B. FRITZ and DEPARTMENT OF LABOR,
OFFICE OF THE SOLICITOR, Kansas City, Kans.

*Docket No. 96-2293; Submitted on the Record;
Issued September 28, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying reimbursement of fitness program costs.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

In the present case, the Office has accepted that appellant, an attorney, sustained an occupational injury of aggravation of herniated nucleus pulposa at L4-5 caused by driving over 4,000 miles in the performance of duty from July to October 1984; carrying luggage; walking up and down stairs; and lifting files. Appellant underwent a decompression laminectomy and excision of a herniated disc at L4-5 on January 19, 1985 which the Office accepted was performed for treatment of appellant's work-related medical condition. The Office further accepted that appellant sustained left sciatic injury (resolved) and aggravation of a herniated disc at L4-5 on January 16, 1987 when he slipped and fell on snow in the performance of duty. The Office also accepted that appellant sustained a recurrence of disability on June 30, 1989 causally related to the January 16, 1987 employment injury. On November 10, 1989 appellant underwent a hemilaminectomy at L3-4 on the right with removal of extruded disc fragment, and a hemilaminectomy and discectomy at L5-S1 on the left, which was accepted by the Office as causally related to the 1987 employment injury.

On February 11, 1994 appellant advised the Office that he had been receiving exercise therapy for over three years at the Baptist Medical Center, which had been paid for by the Office. Appellant noted that, in addition to the cost of the exercise program, the Office had been reimbursing leave buy back for transportation and work time used in this rehabilitation program. Appellant stated that his employing establishment was now offering reduced-cost membership in a workout facility near his office, Workout America. Appellant stated that this facility offered all of the equipment prescribed for his exercise regime. Appellant opined that as the cost of attending the facility near his employing establishment was \$325.00 per year, the Office would

save money by authorizing his use of this facility, in addition to the Baptist Medical Center facility, as he would no longer have to take work time to travel to the exercise facility during the work week. Appellant explained that the Office was currently paying for two hours of transportation per session, three times a week at \$31.00 per hour, or \$9,672.00 per year in leave time.

On July 14, 1994 the Office terminated appellant's entitlement to all medical and wage-loss benefits, based upon the reports of the Office's second opinion physician, Dr. Satish Bansal. On January 31, 1995 an Office hearing representative vacated the termination of appellant's compensation benefits. The Office hearing representative found that Dr. Bansal's opinions were of insufficient probative value to satisfy the Office's burden of justifying termination of compensation benefits. Regarding the exercise program, the Office hearing representative noted that Dr. Bansal did not provide any rationale to explain his opinion that the recommended exercise, although strongly advisable, was for treatment of an underlying condition of lumbar disc disease. The Board finds that as the Office vacated the termination of appellant's compensation benefits, appellant's entitlement to reimbursement of his fitness program costs at the Baptist Medical Center should have been reinstated effective February 21, 1995. The record does not indicate that the Office reinstated such reimbursement.

As appellant was entitled to reinstatement of reimbursement for the Baptist Medical Center fitness program costs, the Office bore the burden of proof to terminate this reimbursement. Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹

The Office denied reimbursement of the fitness program cost by decisions dated April 21, 1995, and January 24 and June 24, 1996 on the grounds that Dr. Bansal had found that such programs would be prophylactic in nature and therefore would not be "likely to give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation." The Board finds that the Office improperly relied upon Dr. Bansal's opinion as the Office hearing representative in his January 31, 1995 decision had already determined that Dr. Bansal's opinions lacked rationale and were of little probative medical value. The Board also finds that the reports of appellant's treating physician support a finding that the fitness program was a form of back-strengthening physical therapy which was necessary to reduce appellant's back pain and prevent further deterioration of appellant's accepted condition.

Section 8103(a) of the Federal Employees' Compensation Act,² provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

² 5 U.S.C. § 8103(a).

In a report dated March 4, 1994 by appellant's treating physician, Dr. Melvin Glazer, a Board-certified rheumatologist, reported that appellant had a long history of difficulty with his back for which he had undergone two laminectomy procedures. Dr. Glazer noted that appellant's previous treating physician and his neurosurgeon, Dr. Stephen Reintjes, had recommended vigorous back-strengthening physical therapy, which was mandatory in order to prevent further back disability. Dr. Glazer stated that appellant was to undergo therapy two to three times a week which included bicycling, weight machines, treadmill, swimming laps, and back-strengthening exercises with general calisthenics. Dr. Glazer stated that appellant would undergo this program for the rest of his life, with the goal of preventing further deterioration of his lumbar osteoarthritis and disc herniation, as maximal muscle strength would prevent future deterioration of his back.

In a report dated June 27, 1994, Dr. Reintjes reported that appellant's commitment to a fitness program had minimized his low back pain and also his reinjury. Finally, in a report dated February 5, 1996, Dr. Reintjes stated that appellant's exercise regime reduced the degree of low back pain he experienced and also reduced the period in which he was disabled by this pain. Dr. Reintjes opined that the exercise regimen would help appellant avoid lost work time and would increase his productivity at work. Finally, Dr. Reintjes opined that the exercise program was a form of treatment and was not preventive in nature.

As the medical evidence of record supports a finding that the Baptist Medical Center Program did reduce appellant's back pain and was aiding in preventing a further deterioration of appellant's accepted back condition, thereby lessening the amount of monthly compensation payable, the Office did not meet its burden of proof to terminate this medical benefit.

The Board also finds that the case is not in posture for decision as the Office has not determined whether appellant's membership in both the Baptist Medical Center fitness program and the Workout America would reduce compensation costs. Appellant has provided his own calculation that the Office would save approximately \$9,000.00 per year in transportation and time lost costs which it expends for appellant's treatment at the Baptist Medical Center program, if he was allowed to also join the Workout America fitness program which was located near his employing establishment. On remand, the Office shall exercise its discretion to determine whether appellant's membership in both programs would lessen the amount of monthly compensation payable. After such further development as necessary, the Office shall issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated June 24 and January 24, 1996 are hereby set aside and this case is remanded to the Office for further proceedings as outlined in this decision.

Dated, Washington, D.C.
September 28, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member